

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICARDO ANAYA

Claimant

VS.

CARGILL MEAT SOLUTIONS CORP.

Self-Insured Respondent

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Docket No. **1,032,302**

ORDER

Respondent and its insurance Fund requested review of the June 10, 2010 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on September 8, 2010. On November 2, 2010, the Division's Acting Director, Seth G. Valerius, appointed E.L. "Lee" Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The deposition of Dr. Reiff Brown taken September 9, 2009, is part of the evidentiary record.

ISSUES

It was undisputed that claimant suffered a work-related accidental injury arising out of and in the course of his employment on August 18, 2006. The nature and extent of claimant's disability was disputed but respondent agreed that if claimant met his burden of proof to establish permanent injury to his back from the August 2006 incident, then claimant would be entitled to compensation for a work disability.

The Administrative Law Judge (ALJ) found claimant sustained a 45.5 percent work disability (58% task & 33% wage loss) beginning June 1, 2008 through October 29, 2009, then a 79 percent work disability (58% task & 100% wage loss) from October 30, 2009

through March 7, 2010, and then a 60.5 percent work disability (58% task & 63% wage loss) beginning March 8, 2010.

Respondent requests review of the nature and extent of disability. Respondent notes that approximately 20 years ago claimant had injured his back and received a settlement for that injury. Respondent argues that claimant failed to disclose his previous injury to the medical experts in this case and, consequently, their expert opinions are not credible and claimant's request for a work disability should be denied.

Claimant argues that the testifying doctors in this case were aware of claimant's previous injury and respondent's argument is disingenuous as respondent's counsel cross-examined Dr. Reif Brown regarding claimant's previous back injury. Claimant requests that the ALJ's Award be affirmed.

The sole issue raised on review before the Board is the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. The Board adopts those findings and conclusions as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

Briefly stated, claimant testified he had a previous low back injury in 1989 while working as a truck driver for a company in California. He had low back pain which continued into his buttock and left knee. Claimant received conservative treatment for that injury and settled the worker's compensation claim. He could not recall whether he received a permanent impairment rating or any restrictions but noted he was not able to return to the specific job he had held at that time. But claimant noted that he had recovered from that injury and had good back function.

Claimant slipped and fell at work for respondent on August 18, 2006. He reported the accident and sought medical treatment with Dr. Hunsberger, the company doctor. Dr. Hunsberger prescribed medication and physical therapy. Claimant received treatment for a few months. Claimant continued working but noted that he had difficulties performing his job duties. Claimant noted that his back pain is located higher (thoracic) than his previous injury.

Both Dr. Reiff Brown, claimant's medical expert, and Dr. Terrence Pratt, the court ordered independent medical examiner, provided permanent functional impairment ratings for claimant's thoracolumbar and lumbar spine as well as permanent restrictions.

When claimant was hired by respondent he had passed a pre-employment physical examination and no limitations were placed on his activities. Claimant had worked for respondent for almost ten years. But claimant was terminated on October 29, 2009, due to failing to notify his employer that he had the workers compensation claim in California in the 1980's.

Respondent argues that claimant has failed to meet his burden of proof that he suffered accidental injury as a result of the slip and fall at work. Respondent bases its argument solely on the assertion that Drs. Brown and Pratt neither knew about nor had the medical records concerning claimant's previous back injury and consequently, their opinions are not credible.

In Dr. Pratt's May 30, 2008 report he specifically listed the records he reviewed including documentation from Dr. Murati. In listing what those records contained Dr. Pratt noted in pertinent part:

He [claimant] reported a previous injury to his low back in 1989 when he fell while doing job duties as a truckdriver. He reported physical therapy with symptoms resolving and did receive some compensation for the injury.

Dr. Pratt then reported the treatment claimant had received for the 1989 back injury.

Likewise, although Dr. Brown could not recall whether claimant had given him a history of a previous back injury, Dr. Brown testified that he was aware of claimant's previous back injury from a review of claimant's medical records. On cross-examination Dr. Brown further testified:

Q. May there be a cause-and-effect relationship between his current injury at Cargill and the injury that he suffered in California?

A. Well, I don't think so. He did give me a history that -- or he gave a history to Dr. Murati that he had recovered completely after that earlier injury and had had good back function.¹

Again, the sole defense raised by respondent is that Drs. Brown and Pratt's opinions are not credible because they were unaware of claimant's previous back injury and they did not have medical records regarding that injury. Clearly, both Drs. Brown and Pratt were

¹ Brown Depo. (Apr. 26, 2010) at 11.

aware of claimant's previous back injury and Dr. Pratt's report lists the nature of medical treatment claimant received for that injury. Respondent's arguments are without merit.

Dr. Brown testified that claimant's slip and fall permanently aggravated the preexisting degenerative changes in claimant's mid thoracic and low lumbar spine. Drs. Brown and Pratt both provided permanent functional impairment ratings for claimant's thoracic and lumbar spine as well as permanent restrictions. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.² The claimant has met his burden of proof to establish that he suffered permanent impairment which entitles him to a work disability. The ALJ's findings, in this respect, are adopted and affirmed.

On June 9, 2010, the ALJ signed a Stipulation approved by the parties that provided, in pertinent part, that respondent had paid claimant temporary partial disability benefits in the amount of \$21,157.46. The ALJ's Award did not provide respondent a credit for the payment of temporary partial disability benefits in the calculation of the award.

Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. In this respect, temporary partial disability compensation is akin to temporary total disability compensation, as opposed to permanent partial disability compensation. The calculation for temporary total disability compensation is, likewise, tied to the average gross weekly wage that the employee was earning prior to his injury. K.S.A. 44-510c(b)(1) provides:

Where temporary total disability results from the injury, . . . weekly payments shall be made during such temporary total disability, in a sum equal to 66⅔% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, . . .

Further evidence that temporary partial disability is treated the same as, and is considered a form of, temporary total disability is contained within the provisions of K.S.A. 44-510e(a)(2). This provision provides for the calculation of the number of weeks payable for permanent partial disability compensation by subtracting from the 415 weeks the total number of weeks that temporary total disability compensation was paid. This provision has, likewise, been held applicable to temporary partial disability compensation. In other words, the equivalent weeks of temporary total disability compensation are subtracted from the 415 weeks to find the total number of weeks available for an award of permanent partial general disability.

The Act is silent regarding the method and manner that temporary partial is to be considered for purposes of computing an award. In this proceeding, the respondent and

² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

its insurer paid claimant a total of \$21,157.46 in temporary partial disability compensation. Because this sum cannot be utilized in the mathematical formula for computing an award, it must be converted to weeks. The Board finds that the proper method to convert the temporary partial disability compensation paid into a weekly equivalent is to divide the total sum paid, or \$21,157.46, by the weekly temporary total disability compensation rate, or \$483. Using this method, the dollar amount of the temporary partial disability compensation paid in this proceeding is equivalent to 43.80 weeks of temporary total disability compensation. Therefore, the respondent is entitled to a credit for the 43.80 weeks in the calculation of the final award.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 10, 2010, is modified to provide respondent a credit for the temporary partial disability paid and is affirmed in all other respects.

Claimant is entitled to 43.80 weeks of temporary total disability compensation at the rate of \$483 per week or \$21,155.40 followed by 57.93 weeks of permanent partial disability compensation at the rate of \$483 per week or \$27,980.19 for a 15 percent functional disability followed by 73.71 weeks of permanent partial disability compensation at the rate of \$483 per week or \$35,534.31 for a 45.5 percent work disability followed by 18.43 weeks of permanent partial disability compensation at the rate of \$483 per week or \$8,901.69 for a 79 percent work disability followed by permanent partial disability compensation at the rate of \$483 per week not to exceed \$100,000 for a 60.50 percent work disability.

As of March 31, 2011, there would be due and owing to the claimant 43.80 weeks of temporary total disability compensation at the rate of \$483 per week in the sum of \$21,155.40 plus 150.07 weeks of permanent partial disability compensation at the rate of \$483.00 per week in the sum of \$72,483.81 for a total due and owing of \$93,639.21 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$6,360.79 shall be paid at the rate of \$483 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Self-Insured Respondent
Pamela J. Fuller, Administrative Law Judge